LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 13 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 610

IRVING STRAUSS, HAROLD SOLODAR, HARRY SCHILLING, CHARLES KRAUSS, and SAMUEL W. BEHRMAN,

Appellants,

v.

THE UNIVERSITY OF THE STATE OF NEW YORK, ALEXANDER J. ALLEN, JR., GEORGE HOPKINS BOND, JOHN F. BROSNAN, EDGAR W. COUPER, EDWARD R. EASTMAN, CAROLINE WERNER GANNETT, JACOB L. HOLTZMANN, W. KINGSLAND MACY, DOMINICK F. MAURILLO, WELLES V. MOOT, JOHN P. MYERS, ROGER W. STRAUS, and WILLIAM J. WALLIN as members of the Board of Regents and HAROLD R. BARNES, F. EARLE CUSHING, HAROLD J. FISHER, LELAND D. LYON, and CLARENCE C. ROGERS as members of the State Board of Examiners in Optometry,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

CHARLES A. BRIND, JR.,
State Education Building,
Albany, New York,
Attorney for Appellees.

JOHN P. JEHU,
ELIZABETH M. EASTMAN,
GEORGE B. FARRINGTON,
Of Counsel.

INDEX.

	PAGE
Pertinent Statutes and Regulations	2
Statement of Facts	4
Argument	5
I. The Appeal Herein Does Not Present a Substantial Federal Question	5
II. The Judgment Rests On An Adequate Non-Federal Basis	10
III. The Notice of Appeal Did Not Comply With Rule 10	14
Conclusion	14

Table of Cases.

Lee Optical of Oklahoma, Inc. vs. Williamson, 348 U. S. 483 ..... 4, 5

Semler vs. Oregon Board of Dental Examiners, 294 U. S. 608 13

Williamson vs. Lee Optical of Oklahoma, Inc., 348 U. S. 483 ..... 4, 12, 13

IN THE

Supreme Court of the United States

October Term, 1957

No. .....

IRVING STRAUSS, HAROLD SOLODAR, HARRY SCHILLING, CHARLES KRAUSS, and SAMUEL W. BEHRMAN,

Appellants,

v.

THE UNIVERSITY OF THE STATE OF NEW YORK, ALEXANDER J. ALLAN, JR., GEORGE HOPKINS BOND, JOHN F. BROSNAN, EDGAR W. COUPER, EDWARD R. EASTMAN, CAROLINE WERNER GANNETT, JACOB L. HOLTZMANN, W. KINGSLAND MACY, DOMINICK F. MAURILLO, WELLES V. MOOT, JOHN P. MYERS, ROGER W. STRAUS and WILLIAM J. WALLIN as members of the Board of Regents and HAROLD R. BARNES, F. EARLE CUSHING, HAROLD J. FISHER, LELAND D. LYON, and CLARENCE C. ROGERS as members of the State Board of Examiners in Optometry,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

The appellees, the University of the State of New York, the Board of Regents of the University of the State of New York, and the State Board of Examiners in Optometry, do hereby move to dismiss the appeal herein.

The grounds for appellees' motion to dismiss the appeal are as follows:

I. The appeal does not present a substantial Federal question.

II. The judgment rests on an adequate non-Federal basis.

III. Such appeal was not taken in conformity with the Rules of this Court, viz., Rule 10. The notice of appeal herein did not comply with this rule in that it did not state the portions of the record to be certified by the clerk of the lower court or the precise questions presented by the appeal.

Pertinent Statutes and Regulations

The provisions of the Education Law of this State under which the Regulation, which is the subject of this action, was adopted are as follows:

"§207. Subject and in conformity to the constitution and laws of the state, the regents shall exercise legislative functions concerning the educational system of the state; determine its educational policies, and, except, as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trusts conferred or charged upon the university and the education department. * * * Rules or regulations, or amendments or repeals thereof, adopted or prescribed by the commissioner of education as provided by law shall not be effective unless and until approved by the regents, except where authority is conferred by the regents upon the commissioner of education to adopt, prescribe, amend or repeal such rules or regulations."

"§ 211. Conformably to law the regents may supervise the entrance regulations to and the licensing under and *the practicing of* * * * *optometry* * * * and any other profession which may hereafter come under the supervision of the board of regents * * *" (Emphasis supplied).

"§ 7108. The department shall have power to revoke the license * * * of any optometrist upon proof that the holder thereof has been guilty of unprofessional conduct, or of any fraud, deceit or misrepresentation in his practice or in his advertising * * *."

"§ 7111. No person shall falsely personate a licensed optometrist of a like or different name, nor buy, sell, or fraudulently obtain a license or certificate of exemption issued to another, or *advertise* the practice of optometry *in violation of rules to be made by the department* * * *" (Emphasis supplied).

The regulation which appellants challenge provides as follows:

"§ 70. Definitions. 1. Unprofessional conduct, fraud and deceit. Unprofessional conduct, fraud, deceit or misrepresentation in the practice of optometry under sections 1432 and 1433 of the Education Law shall include but shall not be limited to the following:

* * *

"g. Advertising by means of large display, glaring, illuminated or flickering signs or by means of any sign containing as a part thereof the representation of the human eye or any portion of the human head or the representation of spectacles, eyeglasses, frames or mountings. A large display sign shall mean a sign containing letters exceeding six inches in height on the first or ground floor and eight inches in height on the second floor or above and exceeding one foot by three feet over-all. The use by an optometrist of more than five signs shall also be deemed a large display. An illuminated sign shall mean a sign lighted or self-luminous by any means whatever, or giving the outward appearance of same."

This provision was amended by the Board of Regents on January 25, 1957, by the addition of the following language:

"Nothing herein contained shall be deemed to prevent the illumination of a sign setting forth the name

of the practitioner and the word 'optometrist' provided that the illumination is not colored and such sign does not otherwise conflict with this regulation."

Statement of Facts

This is an action for a declaratory judgment and an injunction brought by five licensed optometrists against the University of the State of New York, the Board of Regents and the State Board of Examiners in Optometry. The declaration sought was to invalidate subparagraph (g) of Section 70 of the Regulations of the Commissioner of Education, as approved by the Board of Regents on June 16, 1950. The provision restricts the use of "large display, glaring, illuminated or flickering signs * * *," etc., by optometrists (R-32).

The appellees, at Special Term, asked for an order dismissing the complaint for failure to state a cause of action. The motion was denied and the injunction granted at Special Term (Taylor, J.), (R-283 *et seq.*) and the appeal sustained by the Appellate Division (280 App. Div. 1017). Thereafter appellees made a motion for judgment on the pleadings and that motion was denied at Special Term (Bookstein, J., R-292 *et seq.*). The order was affirmed by the Appellate Division (282 App. Div. 593). Thereafter a trial was had as directed by the Court. The Official Referee (Heffernan, J.) found the regulation to be reasonable and the contention of appellants that the regulation violates their rights under Article Fourteenth of the United States Constitution to have been decided adversely to appellants by the United States Supreme Court in *Williamson v. Lee Optical of Oklahoma, Inc., et al.*, and *Lee Optical*

[1] Unless otherwise stated, figures in parentheses refer to folios of record on appeal to Court of Appeals.

of Oklahoma, Inc. v. *Williamson*, 348 U. S. 483, and 854, 349 U. S. 925 (R-250-270). This determination was upheld by the Appellate Division (2 A. D. 2d, 179, R-328-378). Mr. Justice Bergan stated in the opinion that the difference in treatment between different professions on which appellants rely as a basis for the jurisdiction of the United States Supreme Court "is not 'discrimination' in any constitutional or legal sense." He stated further "The main burden of plaintiffs' quarrel with the regulation is that the prohibition against all illuminated signs goes too far." Mr. Justice Halpern, concurring in part and dissenting in part, felt that the regulation should not totally prohibit illuminated signs (R-378). The majority determination of the Appellate Division was unanimously affirmed by the Court of Appeals (2 N. Y. 2d, 464), and modified in part so as to take into account and declare valid the amendment to the regulation set forth hereinabove. Appellants made a motion for leave to reargue, which motion was denied by the Court of Appeals on May 23, 1957. Thereafter appellants filed a Notice of Appeal to this Court.

ARGUMENT

I.

The appeal herein does not present a substantial Federal question.

In the jurisdictional statement appellants placed great emphasis upon the argument that a substantial question is presented because of the amendments of the regulation subsequent to the argument in the Court of Appeals.

In order to understand the present status of this case, it is to be noted that it has been pending for approxi-

mately six years; the first two years were wasted because respondents thought the papers were adequate upon which to make determinations of the issues and sought dismissal based upon them. The appellants insisted upon a trial. The Court finally concluded that they were technically entitled to one if they insisted upon it. When the trial was finally reached, it was heard by Mr. Justice Heffernan—a retired Justice of the Supreme Court and a former member of the Appellate Division of this State.

An examination of the trial record (R-76-88) will reveal to this Court that it consists for all practical purposes of stipulations putting into evidence the factual material already and theretofore set forth in the papers which had been before the Appellate Division twice.

On the record as we have pointed out under "Facts," Mr. Justice Heffernan found for the respondents. Appellants then sought relief i. the Appellate Division. The Appellate Division unanimously affirmed Mr. Justice Heffernan's opinion except that Mr. Justice Halpern thought that a minor part of the rule referring to advertising through illumination should be clarified. When the case got to the Court of Appeals, counsel for the appellants thereupon completely abandoned any claim of unconstitutionality arising from his earlier contention that the regulation was discriminatory because it applied to optometrists and not to ophthalmologists, oculists and opticians. He said that his clients themselves were against glaring signs, but that the illumination part of the rule was too broad. He indicated that if the rule clearly had permitted a person to illuminate his name so that it could be read at night or in dark hallways, he would have no objection to the entire rule.

Counsel to the Board of Regents then stated in open court that the rule with respect to illumination related only to the use of light for advertising purposes and that it would not be construed as prohibiting the type of illumination outlined by counsel for the appellants which would not be advertising in the accepted meaning of the term. Counsel for the appellants replied to the Court that the counsel for the Regents might be replaced some time by one who would not so construe the rule and that the rule, therefore, was bad. Thereupon counsel to the Regents informed the Court that the Regents were then presently in session and that in his opinion they would be quite willing to clarify the rule to meet appellants' counsel's objection. The counsel for the appellants then assured the Court that this was a satisfactory solution and the case was adjourned. Certainly no objection was at that stage registered by counsel for the appellants.

Counsel for both appellant and respondent immediately repaired to the outer room, sat around a table and drafted the amendment which the Regents subsequently adopted, in the formulation of which counsel for appellants participated. It was the counsel for the Regents firm understanding that the amendment met the objection made by the appellants.

So now we find ourselves in this position. Counsel for appellants had abandoned any constitutional objection he had as to "discrimination". That is the reason no reference is made to discrimination in the Court of Appeals decision.

The objection made by him to the rule was cured by the amendment in the formulation of which he participated. In any event, it cured the very objections he had stated in open Court.

Where then is there any question, in good faith, left which this Court should be asked to pass upon? The claim that his constitutional right to his day in Court to argue about the amended rule was denied to him is absurd. Absurd because it corrected the very objection he had made to the rule and the only objection he had made to the rule. How can he argue both ends to the middle? First that the rule was bad because it did not contain the clarification and when the clarification is added, which is exactly what he claimed he wanted, that he has not had his day in Court to argue about the clarification. The only basis that we can ascribe to these tactics is—like his insistence of a trial in the first place—merely for the purpose of continued delay.

The profession of optometry is anxious to rid itself of unprofessional advertising and the record so reveals.

At the 1950 Convention the following resolution was adopted:

> "WHEREAS, Resolution No. 1, which was adopted by the 53rd Annual Convention of the NYSOA, and reaffirmed by Resolution No. 1 of the 54th Annual Convention, still remains uncompleted; and
>
> "WHEREAS, steps have already been instituted toward the presentation to the Board of Regents of the State of New York and the promulgation by them of a regulation relating to the use of large displays, glaring, flickering *or illuminated* signs; now, therefore, be it
>
> "RESOLVED, That the NYSOA, in convention assembled, does hereby reiterate and affirm the provisions of Resolution No. 1, as adopted in 1948 and does further authorize the taking of any and all steps toward the ultimate promulgation of a rule by the Board of Regents in accordance with the terms of this resolution." (Emphasis supplied.)

At the June 15-16, 1950 meeting of the Board of Regents, the regulation in question was adopted (R-186).

After the Regents adopted the regulation, a group of optometrists requested that it be reconsidered and that opponents of the regulation be given an opportunity to appear before the Regents and argue the matter. Two of the appellants were members of that group. The Regents granted the request for an opportunity to be heard and the regulation was not enforced pending deliberation. At the time of the hearing it appeared that the proponents of the regulation had polled the profession as an additional check of the sentiment of the profession although the professional society had already expressed itself on the subject. At that time petitions and cards were presented from which it appeared that of the 2000 optometrists registered approximately 1200 or 68% replied to the inquiry that they were in favor of the adoption of the regulation. Of the total number of optometrists registered it was estimated that 182 were not practicing so that actually about 1823 optometrists were in practice at that time. Approximately 300 failed to reply to the inquiry and a like number replied indicating that they were opposed to the regulation (R-187-189). It is a logical conclusion that the 300 who failed to reply were not opposed to the regulation, otherwise they would have expressed their opinions. These figures make it very apparent that the profession as a whole was firmly convinced that the regulation was a true reflection of the views of the profession with respect to the unprofessional character of the conduct restrained thereby.

There was a full and complete hearing before the Regents, the parties filed briefs and thereafter in December of 1950, the Regents affirmed the adoption of the regulation (R-154-156).

II.

The Judgment rests on an adequate non-Federal basis.

We do not feel that the issue raised by the appellants, that because the optometry rule does not apply to the personnel of another profession and hence "discriminates" between the two professions, is properly a problem before this Court because appellants abandoned this issue or conceded it in the Court of Appeals.

In any event, we suppose, technically, the decision of the Court of Appeals confirmed the findings of the Appellate Division (although no reference is made to this constitutional problem in the Court of Appeals decision) when it confirmed the order as made by the Appellate Division.

Professional rules of practice applying to doctors do not apply to optometrists or opticians and vice versa. Professional rules applying to doctors do not apply to pharmacists. Professional rules applying to registered nurses need not apply to practical nurses. Professional rules applying to certified public accountants need not and could not apply to ordinary accountants. Professional rules applying to engineers need not encompass architects, and so on. This is clearly the reason the New York State Courts in this case have said that such different treatment as alleged here is not discrimination in any constitutional or legal sense and hence there is no Federal question involved. Lest there be any misunderstanding concerning the use of terms here used, we note:

In New York State there are three professions having various responsibility as to the eyes—optometrists, ophthalmologists and opticians. The ophthalmologist is a physician who has voluntarily taken post-graduate courses

and post-internships as required by the Section on Ophthalmology of the American Medical Association. After having taken these courses, the physician submits himself to written and practical examinations conducted by this Section and upon passing becomes a diplomated ophthalmologist.

The oculist is also a physician, but does not necessarily have the post-graduate training.

The ophthalmologist and the oculist are principally interested and engaged in pathology and surgery of the eye. In the course of their practice, they also engage in the refraction of the eye for the purpose of correcting vision, but this is only a minor and incidental portion of their work.

The ophthalmologist or oculist only occasionally fills the prescription he writes for eyeglasses to correct vision. The patient is given the prescription and goes to an optician whose function is hereafter described.

The optometrist is licensed under Section 7101 *et seq.* of the Education Law which defines optometry as the diagnosing of an optical deficiency or deformity, visual or muscular anomaly of the eye without the use of drugs, and the prescribing and furnishing of lenses, prisms or ocular exercises or both for correction and relief.

The optometrist is engaged exclusively in the correction and improvement of vision. He is the only practitioner exclusively and specifically trained, educated, examined and licensed to deal only with vision.

Prior to 1946 the optician was not licensed. In that year, a licensing law was enacted which uses the term "ophthalmic dispenser". The two terms "ophthalmic dispenser" and "optician" are synonymous.

The optician is licensed under Section 7120 *et seq.* of the Education Law to prepare, measure, fit and adjust spectacles and eyeglasses on the written prescription of a physician or an optometrist. The optician is like the pharmacist. He may only fill prescriptions. He may not prescribe. He performs the technical work of assembling, fitting and adjusting eyeglasses.

Appellants argue that the regulation discriminates because it applies only to optometrists and not to the other named groups. This argument upon examination is untenable.

Ophthalmologists and oculists are physicians. The medical profession is self-disciplined; so far as advertising is concerned there is no need for such regulation. So far as opticians are concerned, the statutory provisions governing the profession are different. Regulations governing the practice of that profession adopted pursuant to its statute are the subject of pending litigations. However, the mere fact that the regulation applies only to optometrists is no ground for the claim of discrimination because the professions, as heretofore pointed out, are different and the optometrists perform different functions from either the ophthalmologists or opticians.

As the Court has said in *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, at page 489:

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas*, 310 U. S. 141, 84 L. ed. 1124, 60 S. Ct. 879, 130 A. L. R. 1321. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Oregon State Dental Examiners*, 294 U. S. 608, 79 L. ed. 1086, 55 S. Ct. 570. The legislature may select one phase of

one field and apply a remedy there, neglecting the others. *A. Feof L. v. American Sash & Door Co.*, 335 U. S. 538, 93 L. ed. 222, 69 S. Ct. 258, 260, 6 A. L. R. 2d 481. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch."

Again we reiterate, the decision of the Court of Appeals itself rests on an adequate non-federal ground. The holding of the Court below is to the effect that the regulation is legally reasonable and, hence, within the power of the Commissioner of Education and the Board of Regents to enact under State Law.

In affirming the intermediate Court, which, in turn, affirmed the Official Referee below, the Court of Appeals in effect stated that the purported Federal question was no longer open to argument, having been settled by the United States Supreme Court in *Williamson* vs. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, and, hence, the only questions which were settled by the Court below were non-federal and, therefore, insufficient as a basis for the jurisdiction of the United States Supreme Court.

This Court has heretofore held that a state may properly regulate advertising of professional practitioners where such regulation is reasonably related to the public health and welfare (*Semler* vs. *Oregon Board of Dental Examiners*, 294 U. S. 608). This rule was followed in *Williamson* vs. *Lee Optical of Oklahoma, Inc.*, *supra*, with respect to practitioners treating eye conditions.

III.

The notice of appeal did not comply with Rule 10.

The notice of appeal herein did not state either the portions of the record to be certified by the clerk of the lower court to this Court or the questions to be presented.

Subsequently, appellants filed a document which they designate as "questions to be presented by appeal herein supplemental to notice of appeal", in which they purport to present three questions in relation to the validity of the regulation under attack and to designate the portions of the record to be included in the certified transcript. It is apparent that even as attempted to be supplemented by this document, the notice of appeal does not comply with Rule 10.

CONCLUSION

For all the foregoing reasons it is respectfully urged that the appeal herein should be dismissed.

Respectfully submitted,

CHARLES A. BRIND, JR.
State Education Building
Albany, New York
Attorney for Appellees

JOHN P. JEHU
ELIZABETH M. EASTMAN
GEORGE B. FARRINGTON
Of Counsel